RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

(3) (4)

Nos. 04-277 & 04-281

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

-and-

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES,

Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE VERIZON TELEPHONE COMPANIES, GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS, and VERIZON INTERNET SERVICES INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the statutory definitions contained in the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*, prohibit the Federal Communications Commission from classifying broadband Internet access service as one integrated "information service," subject to minimal regulatory constraints, without any separately regulated "telecommunications service" component.

PARTIES TO THE PROCEEDING

Respondents adopt the list of parties to the proceeding in the court of appeals that is contained in the Petition for a Writ of Certiorari filed by the Federal Communications Commission and the United States, with the exception of the proper "Verizon" respondents as listed below pursuant to Rule 29.6

RULE 29.6 DISCLOSURE

Respondents the Verizon telephone companies, listed below, are wholly owned subsidiaries of Verizon Communications Inc.:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Respondent GTE.Net LLC d/b/a Verizon Internet Solutions is a wholly-owned subsidiary of Verizon Technology Corp., which itself is an indirect, wholly-owned subsidiary of Verizon Communications Inc.

Respondent Verizon Internet Services Inc. is a wholly-owned subsidiary of Bell Atlantic Entertainment and Information Services Group Inc., which itself is an indirect, wholly-owned subsidiary of Verizon Communications Inc.

Verizon Communications Inc. is a publicly held corporation. Verizon Communications Inc. does not have a parent company, and no publicly held company has a ten-percent or greater interest in it.

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Pursuant to Rule 12.6 of the Rules of this Court, the Verizon telephone companies, GTE.net LLC d/b/a Verizon Internet Solutions, and Verizon Internet Services Inc. (collectively "Verizon") submit this response in support of the Petitions for Writs of Certiorari filed by: (1) the Federal Communications Commission (the "FCC" or the "Commission") and the United States of America; and (2) the National Cable & Telecommunications Association, Charter Communications, Inc., Cox Communications, Inc., Time Warner Inc., and Time Warner Cable Inc. (collectively "NCTA").

The Ninth Circuit's decision that cable modem service provided to retail subscribers must contain a separate "telecommunications service" subject to outdated common carrier regulations is a gross misinterpretation of the statutory definitions in the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.* (the "Communications Act" or the "Act"), and represents an unprecedented judicial arrogation of power over national telecommunications policy. The Ninth Circuit's ruling has introduced uncertainty into the entire broadband market, stifling investment and frustrating the goal of both Congress and the FCC to promote the deployment of advanced communications technologies.

The *per curiam* decision of the panel below conflicts with both FCC and judicial precedent regarding the distinction between services that should be regulated as common carriage and those that must be subject to a substantially lighter regulatory touch. The Ninth Circuit placed legal handcuffs on the FCC's ability to properly classify broadband technology, based not on a clear and unambiguous expression of congressional will, but based instead on its own prior (and incorrect) statutory analysis conducted without the benefit of a formal decision rendered by the Commission. Because the issue is of national importance, because the Ninth Circuit ignored well-established principles of both communications law and administrative law, and because

the decision below conflicts with both FCC and D.C. Circuit precedent, the Petitions for Writs of Certiorari should be granted.

OPINION AND ORDER BELOW

Verizon adopts the statement regarding the opinion and order below that is contained in the Petition for a Writ of Certiorari filed by the FCC and the United States.

STATEMENT OF JURISDICTION

Verizon adopts the statement of jurisdiction that is contained in the Petition for a Writ of Certiorari filed by the FCC and the United States.

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Communications Act: 47 U.S.C. §§ 153(20), 153(43), 153(46), 160(a), 230, 254, and 522. This case also involves Section 706 of the Telecommunications Act of 1996, § 706, Pub. L. No. 104-104 ("1996 Act"), 110 Stat. 153, *reprinted in* 47 U.S.C. § 157 note.

47 U.S.C. §§ 153(20), 153(43), 153(46), 160(a), 230, 254, and 522 are reprinted at FCC Pet. 208a-213a. Section 706 of the 1996 Act is reprinted at Resp.18a-20a.[1]

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1. Citations to "FCC Pet." are to the Petition for a Writ of Certiorari filed by the FCC and the United States. Citations to "NCTA Pet." are to the Petition for a Writ of Certiorari filed by NCTA. Citations to "Resp." are to the instant response in support of certiorari. For the convenience of the Court, this response includes a supplemental appendix containing the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), in addition to Section 706 of the 1996 Act, *see* Rule 14.1(*i*)(ii), 14.1(f).

STATEMENT

A. Legal And Factual Background

1. The National Policy Goal Of Promoting Broadband Investment And Deployment

This case involves the proper statutory classification, and hence the proper regulatory treatment, of broadband (or "high-speed") services used to access the Internet. Broadband services allow the retrieval of information from the Internet in "real-time" and the reception of high-quality graphics, pictures, and even audio and video through the Internet, at speeds up to twenty times faster than telephone narrowband (or "dial-up") connections. *See* FCC Pet. 54a.

Numerous competitors using different "last mile" transmission technologies currently offer broadband Internet access service. Broadband service offered over cable networks is referred to as "cable modem service." *See id.* at 50a. The first generation of wireline broadband services offered by telephone companies, including Verizon, are called "digital subscriber line" ("DSL"). Verizon has recently started to deploy the next generation of wireline broadband services, referred to as "fiber-to-the-premises" ("FTTP"). Verizon's FTTP network will allow data speeds ten times faster than cable modem or DSL service, will include a separate path for video transmissions, and will be more reliable and less costly to maintain than are today's copper-based technologies. Satellite operators, fixed and mobile wireless companies, and utility providers currently offer broadband services in competition with cable modem service and DSL. *See, e.g.*, *Availability of Advanced Telecomms. Capability in the United States*, FCC 04-208, at 8, 13, 14-23 (2004) ("*Fourth Section 706 Report*"), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-208A1.pdf.

Broadband allows businesses to increase productivity, resulting in substantial economic and job growth. *See* FCC Pet. 4. Consumers receive benefits in the form of more efficient service from the business sector, and also in the form of new applications that broadband enables, such as public safety services, telecommuting, education, telemedicine, and employee training.[2] Broadband also fuels the development of new and innovative services, including Internet-delivered video, audio, and voice communications. For example, broadband connections have made possible "voice-over-Internet-protocol" (or "VOIP") services, which now compete with traditional telephone services. *Fourth Section 706 Report*, at 24. Next-generation networks, including the FTTP networks that Verizon is deploying, will allow video offerings in competition with the video programming services currently available from broadcast, cable television, and satellite operators.

It is not surprising then that over the last several years the popularity of broadband services has grown exponentially. Indeed, broadband Internet access recently surpassed dial-up for the first time as the primary mode of Internet access in this country. *See* Vauhini Vara, *High-Speed Surpasses Dial-Up as Top Home Web Access in U.S.*, Wall St. J., Aug. 18, 2004, at D4. As of April of 2004, fifty-five percent of adult Internet users had broadband at home or work. *See Fourth Section 706 Report*, at 32.

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2. *See Fourth Section 706 Report*, at 24, 28, 47; *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion*, 19 F.C.C.R. 5136, 5136-37 (2004); FCC, News Release, *Unleashing the Educ. Power of Broadband* (Sept. 8, 2004), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-251908A1.pdf (quoting FCC Chairman Michael K. Powell as stating that "[b]roadband is an essential tool to prepare today's young people for tomorrow's workforce and to facilitate lifelong learning for students of all ages"); Matthew D. Bennett, Alliance for Public Technology, *A Broadband World: The Promise of Advanced Servs.*, 2003, *at* http://apt.org/confer/broadband-world.pdf.

To make the promise of broadband widely available, broadband providers, including both cable operators and wireline telephone companies, have already spent billions of dollars upgrading their existing infrastructure and building new facilities. The United States, however, still lags behind other nations in terms of broadband penetration, ranking eleventh in a recent study. *See id.* at 40 (Chart 14). Because "the infrastructure of today may be insufficient to support the applications of tomorrow," significant additional capital investment is needed to ensure that all Americans, regardless of income level or geographic location, can have access to this critical new technology. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3022 (2002) ("*Wireline Broadband NPRM*").

Congress has made clear that encouraging broadband investment and deployment is among the nation's central communications policy goals. In the 1996 Act, Congress sought to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services." S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement). This national broadband policy was specifically codified. Thus, by statute it is "the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). Congress further directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other things, "utilizing . . . regulatory forbearance, measures that promote competition," and other "methods that remove barriers to infrastructure investment." 1996 Act, §§ 706(a) & (b). Consistent with these statutory expressions of national policy, the FCC has stated that "[t]he widespread deployment of broadband infrastructure has become the central

communications policy objective of the day." *Wireline Broadband NPRM*, 17 F.C.C.R. at 3020-21 (footnote omitted).[3]

2. The Communications Act's Distinct Service Definitions

Three statutory definitions are relevant to this case, each one of which was added to the Communications Act by the 1996 Act: (1) "telecommunications," (2) "telecommunications service," and (3) "information service." 47 U.S.C. §§ 153(43), 153(46), 153(20). The matter in dispute is whether cable modem service offered to retail subscribers should be classified as an "information service" that uses a "telecommunications" component to perform the transmission function, as the FCC found, FCC Pet. 88a-116a, or whether the statutory definitions in the Act require the FCC to find a separate "telecommunications service" offering buried inside every broadband Internet access service, as the Ninth Circuit directed, *id.* at 21a-22a. In essence, the Ninth Circuit held that every broadband service must be taken apart (or "unbundled") and that the transmission component of such services must be broken out and subject to common carrier regulations.

The broadest of the statutory terms at issue here is "telecommunications," which is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The definition encompasses any "pure transmission" function,

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3. *See IP-Enabled Servs.*, 19 F.C.C.R. 4863, 4865 (2004) ("*VOIP NPRM*") (recognizing "the paramount importance of encouraging deployment of broadband infrastructure to the American people") (footnote omitted); Kevin J. Martin, Commissioner, FCC, *A New Framework for Broadband Deployment*, Remarks to the TIA Regulatory Session at Supercomm, Atlanta, Georgia, at 1 (June 3, 2003), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235271A1.pdf (stating that broadband is the Commission's "top priority").

including those used in the delivery of other defined services under the Act. Well before the passage of the 1996 Act, both the FCC and the federal courts had recognized that many "pure transmission" functions are not subject to common carrier regulation. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976) ("*NARUC I*") (upholding Commission decision to treat certain commercial mobile services as non-common carrier telecommunications).

The second statutory classification is a subset of the first. A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Both the FCC and the federal courts have construed the definition of "telecommunications service" to be synonymous with the concept of common carriage as developed and applied by both the FCC and the federal courts prior to the enactment of the 1996 Act. *Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8521-22 (1997); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999).[4]

The *sine qua non* of a common carrier service has always been an undertaking to serve all customers indiscriminately, whereas a non-common carrier reserves the right to refuse service or to provide service on individualized and distinct terms and conditions. *NARUC I*, 525 F.2d at 642; *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). The common carriage undertaking may be voluntary or it may be imposed by regulation. Historically, in the absence of a voluntary undertaking to provide a service on a common carrier basis, such duties have been imposed on a transmission

4. *See* H.R. Conf. Rep. No. 104-458, at 115 (Joint Explanatory Statement) (stating that the definition of telecommunications service in the 1996 Act "recognize[es] the distinction between common carrier offerings . . . and private services").

service only where substantial market power necessitates government regulation of both access and price. *See, e.g., Virgin Islands Tel.*, 198 F.3d at 925-27.

Finally, the Act defines an "information service" as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." 47 U.S.C. § 153(20). Services falling within this definition, which involve the generation and manipulation of content, must still be delivered to end-users through some form of transmission. The definition therefore recognizes that all "information services" are made available "via telecommunications." *Id.* By using the broader term "telecommunications," rather than the narrower term "telecommunications service," the statute expressly recognizes that the transmission component of an information service may be either a common carrier or a non-common carrier offering.

This too is consistent with pre-1996 Act precedent, which only requires information service providers to break out the transmission component of their service and offer it to others on a common carriage basis where the transmission provider possesses substantial market power. Since the late 1970's, the FCC's so-called "*Computer Rules*" have required certain wireline telephone companies deemed to have market power to separate out and provide indiscriminate access to the transmission component of their information service offerings. *See Amendment of Section 64.702 of the Comm'n's Rules and Regulations*, 77 F.C.C.2d 384, 474-75 (1980) (subsequent history omitted) ("*Computer II*"). In adopting the *Computer Rules*, the Commission found that certain carriers had "bottleneck" control over narrowband transmission facilities under the market conditions that existed in the narrowband market of the 1970's and 1980's. Based upon that finding, the FCC imposed common carrier obligations on a limited class of providers. FCC Pet. 89a-90a n.163. In contrast, the FCC found that carriers that had no control over local bottleneck facilities,

and therefore "d[id] not have . . . market power," would not be in a position to act anticompetitively and need not be subject to the *Computer Rules*. *Computer II*, 77 F.C.C.2d at 468-69.

The plain language of the Communications Act's definitions of "telecommunications service" and "information service" makes clear that these statutory concepts are "mutually exclusive." *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 16 F.C.C.R. 9751, 9754-56 (2001). The statutory category of "telecommunications services" constitutes a subset of the many transmission activities (both stand-alone and integrated into larger service offerings) that are treated as "as "telecommunications," but *not* "telecommunications service" under the Act. FCC Pet. 116a (noting that "telecommunications is distinct from telecommunications service").[5]

Under the Act, "telecommunications" involves the transmission "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). In order to qualify as a "telecommunications *service*," on the other hand, a transmission function must be offered *as a separate service* for a fee to a specified class of users. *Id.* § 153(46) (emphasis added). And the Act separately defines "information service[s]," which involve the offering of "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information," as services provided "*via* telecommunications." *Id.* § 153(20) (emphasis added). This makes clear that an entity offering "information services" is not necessarily *providing* a separate "telecommunications service"

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5. *See id.* at 116a n.242 (citing *Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776, 9179-80 (1997)); *Implementation of the Telecomms. Act of 1996; Telecomms. Carriers' Use of Customer Proprietary Network Info. and Other Customer Info.*, 13 F.C.C.R. 8061, 8095-96 (1998).

to its retail subscribers, rather it is *using* telecommunications as part of a larger service offering to the public. *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000); *see Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,521 (1998); S. Rep. No. 104-23, 104th Cong., 1st Sess. 18 (1995); H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 46-47 (1995).

The initial statutory classification of any service under the Communications Act is critical to the regulatory regime that will apply. The classification of a transmission service as a "telecommunications service" means that the service generally will be subject to common carrier treatment and regulation under Title II of the Communications Act, such as price controls through tariffing, service regulation, and a requirement to provide service to any customer that demands it. FCC Pet. 6, 27, 9a.[6] By contrast, providers of "information services" have remained largely unregulated and are free to offer their services on an integrated basis to both retail and wholesale customers on market-based terms. *See id.* at 7, 9a; NCTA Pet. 4.

3. The Commission's Treatment Of Broadband Internet Access Services Prior To Its Issuance Of The Declaratory Ruling

During the early stages of the broadband market's development, the FCC declined to adopt a statutory classification for, or to regulate in any way, the provision of cable modem service. This was due to the Commission's belief that the

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6. The FCC does, however, retain the authority to waive any of its rules for "good cause shown," *see* 47 C.F.R. § 1.3, and may forbear from applying any statutory provision or regulation to any telecommunications carrier or telecommunications service if a three-part test is met, *see* 47 U.S.C. § 160(a). As explained below, the existence of this authority does not supply a reason to deny review of the Ninth Circuit's erroneous decision regarding the initial statutory classification of cable modem service. *See infra* pp. 21-23.

dynamic and competitive nature of the broadband market rendered a definitive pronouncement on the issue both unnecessary and premature. *See* FCC Pet. 7-8, 46a; NCTA Pet. 10; *see also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 352-56 (2002) (Thomas, J., concurring in part, dissenting in part) (describing the FCC's "agnosticism" on the statutory classification question). Thus, cable operators were left free from any regulation, let alone restrictive common carrier rules, in their deployment and provision of broadband Internet access from the mid-1990's to the present. In 2002, this Court stated that it could not "fault" the FCC for leaving for another day the "hard" question of cable modem service's regulatory classification, one this Court acknowledged involved "technical, complex, and dynamic" subject matter. *Gulf Power*, 534 U.S. at 339. *But see id.* at 360-61 (Thomas, J., concurring in part, dissenting in part) (chiding the Commission and the Court for leaving the question of proper statutory classification open despite its centrality to proper application of the Communications Act).

On the other hand, during that same time period, the Commission imposed the legacy common carrier obligations applicable to voice telephony on the transmission component of DSL service provided by wireline telephone companies. *See Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 14 F.C.C.R. 19,237, 19,247 (1999); *GTE Tel. Operating Cos.*, 13 F.C.C.R. 22,466, 22,483 (1998). It did so reflexively, in cursory tariff proceedings, based only on the identity of the provider. The extension of common carrier treatment to DSL was not supported by any analysis – let alone a careful examination of the statutory definitions at issue, the relevant market conditions, the incentives to make capital investments and deploy facilities, and the relative costs and benefits of common carrier regulation. The FCC engaged in such a thorough analysis for the first time in the order at issue in this case.

At least in part because it enjoyed a substantial regulatory advantage, cable modem service grew to become the clear leader in the broadband market. For the last several years, cable has consistently maintained a broadband market share of fifty-eight to sixty-five percent. FCC, Indus. Analysis & Tech. Div., *High-Speed Servs. for Internet Access: Status as of Dec. 31, 2003*, at 6 (Table 1) (June 2004), *at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606, 1643 (2004).

B. The Proceedings Below

1. The FCC's Declaratory Ruling

In 2000, the FCC set out to "develop a national legal and policy framework" to govern broadband Internet access services and released the Notice of Inquiry that resulted in the order at issue. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19,287, 19,288 (2000). In its Notice of Inquiry, the Commission asked for comments regarding the interrelationship between the statutory classification of cable modem service and other broadband technologies, including DSL. *Id.* at 19,293.

After reviewing a comprehensive record containing hundreds of submissions from interested parties, and following a detailed examination of the statute that it is tasked by Congress with administering and its own prior precedent, the FCC issued the declaratory ruling at issue in this case. *See* FCC Pet. 40a-188a. The Commission made three critical findings with respect to the proper statutory classification and regulatory treatment of cable modem service.

First, the FCC found that, in light of its consistent conclusion that the broadband market constitutes a separate and

vibrantly competitive product market, there is no basis for compelling cable operators to carve out the transmission component that underlies cable modem service and offer it on a common carrier basis. *Id.* at 98a-102a. Thus, the Commission classified the combined Internet access service offering of cable operators as an "information service," *id.* at 88a-98a, and the underlying transmission component of that service as non-common carriage "telecommunications" under the Act, *id.* at 100a-102a.

Second, the FCC found that where cable operators might be offering broadband transmission service separately to other Internet service providers there was no reason to compel the offering of such service on a common carrier basis. *See id.* at 104a-114a. Thus, the Commission stated that it would allow cable operators to continue to provide transmission service on a non-common carrier, or "private carrier," basis (*e.g.*, as a form of "telecommunications" but not "telecommunications service"). *See id.*

Third, the FCC waived any application of its *Computer Rules* to cable modem service. As discussed above, these rules otherwise would require the transmission component of cable modem service to be offered on a common carriage basis if that transmission component were classified as a "telecommunications service." FCC Pet. 102a-104a. The Commission initiated a further rulemaking proceeding to determine whether to forbear from applying other common carrier requirements to the transmission component of cable modem service if they might otherwise apply. *Id.* at 151a-153a.

The FCC has since commenced, but not completed, proceedings to determine the appropriate regulatory framework that will apply to cable's broadband competitors, including wireline broadband services and powerline broadband services. *See generally Inquiry Regarding Carrier Current Sys., including*

Broadband over Power Line Sys., 18 F.C.C.R. 8498 (2003); *Wireline Broadband NPRM*, 17 F.C.C.R. 3019. The FCC has repeatedly found, both before and after issuance of the order under review, that competition in the broadband market has only continued to grow over time. *See, e.g.*, *Fourth Section 706 Report*, at 8, 13, 14-23; *Wireline Broadband NPRM*, 17 F.C.C.R. at 3022. The federal courts, too, have confirmed that "robust competition" exists in the "broadband market." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"); *see United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004) ("*USTA II*"). The Commission has also reaffirmed the need to encourage investment and deployment through a uniform national broadband policy. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3023.

2. The Ninth Circuit's *Per Curiam* Opinion

Seven different petitions for review of the FCC's decision were filed in the Third, Ninth, and D.C. Circuits pursuant to the Hobbs Act, 28 U.S.C. § 2341, *et seq*. *See* FCC Pet. 10a. For its part, Verizon, which offers wireline broadband service in direct competition with cable modem service, argued that the Commission correctly concluded that cable modem service is an "information service" and that its underlying transmission component is "telecommunications." At the same time, Verizon maintained that the FCC should have resolved questions related to the regulatory classification of the broadband services provided by both cable and wireline operators in its declaratory ruling. *See id.* at 10a-11a. Additional parties raised a variety of other challenges to the Commission's decision. *See id.* at 10a. The petitions were consolidated in the Ninth Circuit under the lottery provisions of 28 U.S.C. § 2112(a)(3). *See* FCC Pet. 11a.

The Ninth Circuit, in a *per curiam* decision, vacated the FCC's determination that cable modem service is an "information service" that does not include a separately regulated

"telecommunications service." *Id.* at 21a-22a. The panel did so not because it disagreed with the Commission's statutory analysis, but because it concluded that it was bound by a Ninth Circuit panel decision which pre-dated any formal FCC decision on the subject. *Id.* at 12a-22a. In that case, *AT&T Corp. v. City of Portland*, a different panel of the Ninth Circuit had held that because cable modem service sold to end users is provided via a transmission component – "telecommunications" under the Communications Act – and because cable modem service is offered to the public, cable modem service *ipso facto* contains a separate "telecommunications service." Thus, the *Portland* panel declared that, absent a forbearance ruling from the FCC, cable modem service *must be subjected* to the full panoply of common carrier obligations under Title II of the Communications Act. *See* Resp. 12a.

The *Portland* panel reached this conclusion despite the fact that other questions were dispositive of the controversy before it, *see* NCTA Pet. 6-7, and notwithstanding the pendency of an FCC proceeding directed at addressing the classification of cable modem service (which the Commission expressly pointed out in its *amicus* brief asking the court to resolve only the narrow question necessary to end the dispute), *see* FCC Pet. 8-9. The panel in *Portland* did not examine the statutory interrelationship and distinctions among "telecommunications," "telecommunications services," and "information services." Nor did it consider the proper market definition, the presence of intensive competition in the broadband market, or the decades of Commission and judicial precedent making clear that common carrier duties cannot be imposed unless the public interest requires them due to competitive conditions. *See supra* pp. 7-9. In addition, the *Portland* panel relied to a large extent on the Commission's treatment of DSL service offered by wireline providers as a "telecommunications service subject to common carrier obligations" in reaching its decision. Resp. 16a. Finally, the *Portland* panel acknowledged that the FCC had yet

to speak to the statutory classification issue and had open administrative proceedings in which it intended to do so. *See id.* at 8a.

The *Portland* panel conceded that "courts are ill-suited to fix [the] flow" of the Internet, and that the "quicksilver technological environment" in which broadband services exist would render it an "idle exercise" for a court even to attempt to establish a national policy on this subject. *Id.* at 8a. Notwithstanding these statements, three years later, the panel in *Brand X* held itself to be bound by *Portland*. FCC Pet 12a-22a. The *Brand X* panel reached this conclusion even though the petitions for review before it involved an FCC decision interpreting the agency's own organic mandate after a comprehensive examination of the structure and operation of the statutory definitions in the Act and the workings of the broadband market.

In so doing, the *Brand X* decision perpetuated the unsupported statutory syllogism upon which the *Portland* panel had relied: (1) "Internet access for most [end] users consists of two separate services," Resp. at 11a; (2) one component of this service constitutes "*telecommunications*" as defined in 47 U.S.C. § 153(43), Resp. at 11a (emphasis added); and (3) therefore, "to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a *telecommunications service* as defined in the Communications Act," *id.* at 12a (emphasis added).

The *Brand X* panel also extended the *Portland* panel's rote reliance on the Commission's prior treatment of DSL services. Indeed, the concurring opinion of Judge Thomas (the author of *Portland*) in *Brand X* makes clear that the FCC's treatment of DSL formed a central part of the *Portland* panel's reasoning and, thus, was integral to the *Brand X* decision. *See* FCC Pet. 31a-32a (Thomas, J., concurring) (explaining prior FCC treatment of "Internet access via DSL" and concluding that the

FCC's approach to DSL "reflects a much more reasonable reading of the statute").

Because it held that *Portland* was dispositive, the *Brand X* panel completely ignored the Commission's findings regarding the competitive state of the broadband market and the lack of any need for common carrier regulation. Nor did the *Brand X* panel consider the fact that the Commission's early decisions treating DSL services as "telecommunications services" did not result from the FCC's careful analysis of the competitive state of the broadband market but, rather, from the mechanical extension of the regulatory regime that historically applied to telephone companies in the separate market for traditional telephone service. In fact, the Commission has explicitly indicated that it is re-examining the proper statutory and regulatory framework for *all broadband services* regardless of the technology used or the corporate identity of the provider. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3037-38, 3040-41. The *Brand X* panel was well aware that the agency was reconsidering its treatment of all broadband transmission platforms, *see* FCC Pet. at 9a n.9 (citing *Wireline Broadband NPRM*, 17 F.C.C.R. 3019); *id.* at 32a n.2 (Thomas, J., concurring) (same); *see also id.* at 46a n.36 (same), yet the panel majority purported to bind the agency to a statutory interpretation that rendered this reexamination significantly more difficult. In sum, the *Brand X* panel adopted, without any independent analysis, the *Portland* decision's finding that cable modem service sold to end users includes a separate "telecommunications service" subject to common carrier regulation. FCC Pet. 21a-22a.[7]

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7. The panel left intact the FCC's determination that transmission services could be offered on a "private carriage" basis to Internet service providers, and did not purport to disturb the Commission's decision to waive the application of the *Computer Rules* to cable modem service or the FCC's power to forbear from applying common carrier requirements in its ongoing rulemaking. *See id.* at 22a n.14; *see also id.* at 34a-35a (Thomas, J., concurring).

REASONS FOR GRANTING THE PETITIONS

The Ninth Circuit's earlier decision in *Portland*, and by extension the decision in *Brand X*, fundamentally misapplied the definitions in the Communications Act and incorrectly concluded that cable modem service sold to end users must initially be classified as a "telecommunications service." The court of appeals adopted this course in the face of a carefully reasoned agency decision that faithfully applied FCC and judicial precedent to arrive at a contrary conclusion. The Ninth Circuit did not find that agency discretion was constrained by an unambiguous expression of congressional will regarding the question at issue but, rather, elevated its own will, contained in a prior circuit opinion, above that of the agency. Irrespective of whether the *Brand X* panel correctly determined that it was bound by *stare decisis* to follow the previous decision in *Portland*, *see* FCC Pet. 19-23; NCTA Pet. 19-29, both decisions incorrectly apply the statutory definitions contained in the Act. This result has injected significant uncertainty with respect to the proper classification of *all* broadband services, thereby undermining investment incentives and discouraging innovation in this burgeoning market in contravention of clearly expressed national policy. It has prevented the Commission from establishing a uniform, national regulatory regime for all broadband providers, regardless of the corporate identity of the provider or the technology used. The intervention of this Court is necessary to correct the errors of statutory construction and the deviation from proper judicial review begun in *Portland* and perpetuated and exacerbated by *Brand X*.

A. The Classification Of Broadband Internet Access Service Under The Communications Act Presents An Issue Of Exceptional National Importance.

Encouraging deployment of and investment in broadband facilities has been among the nation's primary communications policy goals since before the 1996 Act. In furtherance of this

goal, and recognizing that unnecessary regulation impedes investment in new technologies, Congress expressly directed that the broadband market should be permitted to develop in an environment largely marked with "a minimum of government regulation." 47 U.S.C. § 230(a)(4); *see id.* § 230(b)(2); 1996 Act § 706; FCC Pet. 3-5, 24-25, 46a, 47a; NCTA Pet. 17-19.

The Communications Act commands that its service definitions be applied in a technologically neutral manner. Section 706 of the 1996 Act requires the Commission to encourage broadband deployment "without regard to any transmission media or technology." 1996 Act, § 706(c)(1). The Act's definition of a "telecommunications service" similarly makes clear that a service is defined as such "regardless of the facilities used." 47 U.S.C. § 153(46); *see* Resp. 16a; *see also* FCC Pet. 90a.

Unfortunately, through historical accident, the present regulatory regime for broadband services flouts rather than respects these principles of technological and competitive neutrality. Cable operators, unlike their wireline competitors, historically have been free from any regulation whatsoever in their provision of broadband Internet access services and, thus, grew to become – and have remained – the clear leaders in the market. *See supra* pp. 11-12. In recognition of competitive developments in the broadband market, the Communications Act's requirement of technological neutrality, and the disincentives to invest occasioned by common carrier regulation, the Commission has commenced proceedings aimed at developing a uniform national broadband policy and lifting regulatory burdens on broadband providers where they otherwise currently apply. *See supra* pp. 13-14. The Ninth Circuit's decision, if allowed to stand, will result in substantial uncertainty with respect to the FCC's ability to achieve its desired goals, thereby threatening broadband deployment and investment across all platforms.

Imposing burdensome regulation on *any* provider in the competitive broadband market, as the *Brand X* decision purports to require in the case of cable modem service, would be entirely at odds with the express congressional policy that the Internet continue to develop "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); *see* 1996 Act § 706(b); *see also* S. Conf. Rep. No. 104-230, at 1 (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (Joint Explanatory Statement); *S.W. Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Such regulation also would create uncertainty for other broadband providers and would blunt incentives to invest in broadband technologies because, as has been widely recognized, common carrier regulations discourage companies from allocating financial and other resources to new technologies. By directing the FCC to "utilize[e] . . . regulatory forbearance" to encourage broadband deployment, Congress made clear its belief that unnecessary regulatory burdens are affirmatively counterproductive in terms of promoting new investment. 1996 Act, § 706(a).

As the FCC rightly points out, common carrier obligations could lead carriers to "raise their prices and postpone or forego plans to deploy new broadband infrastructure." FCC Pet. 26; *see* NCTA Pet. 19 ("[The] outcome [compelled by *Brand X*] may stifle investment in broadband infrastructure, innovation, and deployment.").[8] On the other hand, certainty that broadband

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8. The Commission has repeatedly affirmed this principle. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3042-43 (noting that minimal regulatory environment is necessary to "encourage market participants to deploy broadband networks more expeditiously and increase facilities-based competition"); *see also VOIP NPRM*, 19 F.C.C.R. at 4864 (noting that the Internet developed into one of the greatest advances in communications technology because it has been "free of many of the regulatory obligations applied to traditional telecommunications services and networks").

networks will remain free from common carrier regulations would result in strong investment incentives so that, in the end, "consumers will benefit from th[e] race to build next generation networks and the increased competition in the delivery of broadband services." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,141 (2003); *see USTA II*, 359 F.3d at 584.[9]

It is no answer to say that the FCC potentially could remove common carrier regulations through the alternative paths left open by *Brand X*, either by classifying the underlying transmission service as "private carriage" or by waiving or forbearing from any common carrier regulations that might otherwise apply.[10] Neither of these possible eventualities, even assuming that it ultimately were to occur, can substitute for the authority Congress clearly conferred upon the FCC to determine whether broadband transmission facilities should be classified as common carrier facilities in the first place.

First, the classification of a service is the *threshold* issue under the Communications Act and, absent further action by the FCC, dictates specific regulatory treatment. *See supra* p. 10; FCC Pet. 6, 27, 9a. Congress delegated the authority to

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9. *See also Computer II*, 77 F.C.C.2d at 387 ("the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network").

10. *See* FCC Pet. 22a n.14 (declining "to consider the [parties'] remaining claims (including those directed at the validity of the FCC's determination that [some cable operators] offer[] cable transmission to unaffiliated ISPs on a private carriage basis and its waiver of the *Computer II* requirements for cable companies who also offer local exchange service")); *id.* at 34a-35a (Thomas, J., concurring) ("Naturally, the FCC may choose to forbear from enforcing these regulations.").

the Commission to initially determine how services are classified under the Act and thus how they are regulated. *See* Resp. 17a; FCC Pet. 11a. The Commission's expertise is critical in this area, because questions relating to how Internet services, including those provided by cable operators, should be treated under the Act present "hard questions," *Gulf Power*, 534 U.S. at 338, in an area that is "technical, complex, and dynamic," *id.* at 339.

The court below purported to "beat the FCC to the punch" as to the proper classification of cable modem service, leading to what Judge O'Scannlain accurately characterized as an exceedingly "strange result": "three judges telling an agency acting within the area of its expertise that its interpretation of the statute it is charged with administering cannot stand – and that [their] interpretation . . . is the correct . . . interpretation." FCC Pet. 24a-25a (O'Scannlain, J., concurring); *see id.* at 25a n.18 (citing *United States v. Mead Corp.*, 533 U.S. 218, 246 (2001) (Scalia, J., dissenting)). By prohibiting the Commission from taking the most direct – and the statutorily prescribed – route to determining the proper regulatory treatment of broadband services, the Ninth Circuit's decision turns the statutory structure on its head. The statutory default becomes common carrier treatment, and the Commission can correct this error only through indirect and circuitous statutory proceedings that should be unnecessary. An erroneous statutory ruling by a court of appeals cannot escape review because it is *possible* that the agency may be able to fashion a means to accomplish in a more complicated and indirect fashion what Congress gave it authority to achieve immediately and directly.

Second, it is likely that the question whether "private carriage" classification or forbearance is appropriate would be hotly contested and ultimately challenged in court, causing delay and perpetuating uncertainty. *See id.* at 28. One need look no farther than the procedural history of this case itself to predict that, regardless of the result, the FCC's conclusions would be

the subject of significant controversy and appellate review. The resulting delay would only worsen the uncertainty that has already plagued the broadband industry, a result that "itself may discourage investment and innovation," *id.* at 28, 47a, and thus directly contravenes our nation's telecommunications policy goal of promoting broadband deployment.

Today broadband competition stands at a crossroads: cable operators continue to enjoy nearly a two-thirds share of the residential market, but wireline providers remain formidable competitors and new technologies are on the horizon. *See supra* p. 12. And broadband providers, including Verizon, are beginning to construct the next generation of broadband networks that will be capable of delivering faster speeds, innovative services, and increased reliability at lower costs. But widespread deployment of second-generation broadband networks requires significant amounts of up-front capital to be placed at competitive and technological risk. Impeding investment in broadband at this critical time by requiring businesses to labor under a cloud of legal and regulatory uncertainty threatens to have lasting adverse effects on the deployment of new infrastructure.

B. The Panel Decision Below Is Inconsistent With The Terms Of The Communications Act And Conflicts With A Significant Body Of Precedent.

The *Portland* panel's conclusion that the transmission component of cable modem service sold to end users is a "telecommunications service," which was adopted without analysis by the *Brand X* panel, directly contravenes the terms of the Communications Act. As explained above, the Act defines two distinct categories of activities that involve the "transmission" of information. The first of those, "telecommunications," includes any "transmission"

of information without change in the form or content of that information. 47 U.S.C. § 153(43). The second, "telecommunications services," is a subset of the first, and includes only "telecommunications" that are offered on common carrier terms. *See id.* §§ 153(46), 153(44). The Act also defines a third category of activities, "information services," which by definition are made available "via telecommunications," *id.* § 153(20), but that does not, contrary to the Ninth Circuit's apparent view, render them part "telecommunications services" under the Communications Act.[11]

Indeed, if the Ninth Circuit were correct that cable modem service includes a separate "telecommunications service" simply because it includes a transmission function that is ultimately offered "to the public," *see* Resp. 11a, then there would have been no reason for Congress to have included a separate definition of "telecommunications" in the Communications Act or to have specified that "information services" are made available "via telecommunications," *see, e.g.*, *United States v. Bean*, 537 U.S. 71, 75 n.4 (2002) ("The use of different words within related statutes generally implies that different meanings were intended." (quoting 2A N. Singer, Sutherland on Statutes and Statutory Construction § 46.06, p. 194 (6th ed. 2000))). At the end of the day, almost every communications service

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11. Whatever the validity of the *Brand X* panel's determination that it was bound by *Portland*, *see* FCC Pet. 11a-21a, this Court obviously is not so bound and may review the FCC's decision under the familiar two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* NCTA Pet. 21 & n.10. Indeed, in *Chevron* itself this Court reversed the decision of a court of appeals despite the fact that the court of appeals had followed its own precedent in setting aside the agency decision at issue. *Chevron*, 467 U.S. at 841-45; *see, e.g.*, *Muhammed v. Close*, 540 U.S. 749, 124 S. Ct. 1303, 1306 (2004) (*per curiam*) (criticizing court of appeals for "following the mistaken view expressed in [c]ircuit precedent").

includes some element of "transmission," either because it provides only a transmission function or because a transmission function is an integral part of a larger service package. Under the express definitions in the Act, however, that does not mean that the transmission element necessarily qualifies as a "telecommunications service," regardless of whether the transmission element is offered on a stand-alone basis or, as in this case, as part of a larger service package offered to the public. As a matter of statutory construction, the Ninth Circuit's view makes no sense at all.

The Ninth Circuit's decision that cable modem service includes a separate "telecommunications service" just because it includes a "transmission" component also conflicts with a substantial body of judicial and FCC precedent. In fact, neither the question whether common carrier treatment should be imposed on a service that involves transmission, nor the question whether a carrier should be compelled to offer the transmission component of an integrated service separately, depends on whether a service offered to the public involves an element of "transmission." Congress would have been aware of this pre-existing body of precedent at the time it passed the 1996 Act, yet did nothing to change that state of affairs. On the contrary, as explained above, Congress included definitions in the 1996 Act that are fully consistent with, and reinforce, this precedent.

Specifically, under a long line of Commission and judicial precedent consistently applied both before and after the 1996 Act, in the absence of a voluntary undertaking to offer the transmission component of a service on common carrier terms, the decision to impose common carrier treatment depends on whether "the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently" because the carrier "has sufficient market power." *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21,585, 21,588-89 (1998); *see Cable & Wireless, PLC*, 12 F.C.C.R. at 8521-22; *Virgin Islands Tel.*, 198 F.3d at 924-25; *NARUC I*, 525 F.2d at 642. Absent a unilateral decision

to serve all customers indifferently, classification of a service as a "telecommunications service" – and imposition of attendant common carrier obligations – must be based upon a finding of market power. *See, e.g., AT&T Submarine Sys.*, 13 F.C.C.R. at 21,589; *see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21,905, 21,957 (1996) (declining to impose Title II regulation because the relevant market was "highly competitive").

The Ninth Circuit's finding that cable modem service is partially a "telecommunications service" under the Communications Act just because it includes a "transmission" component, Resp. 12a, stands in direct conflict with the D.C. Circuit's ruling in *Virgin Islands Telephone*. In that case, the D.C. Circuit concluded that the 1996 Act *did not* change the Commission's historical market-based analysis of the question whether an entity provides a common carrier "telecommunications service" under the Communications Act. *See Virgin Islands Tel.*, 198 F.3d at 926-27. It expressly rejected the argument that the new definition of "telecommunications service" in the 1996 Act bound the FCC to exactly the kind of wooden analysis prescribed by the Ninth Circuit in *Portland* and *Brand X*. *See Virgin Islands Tel.*, 198 F.3d at 925, 927 (rejecting argument that the definition of "telecommunications service" in the 1996 Act is "a new statutory standard that effects a drastic change in the regulatory regime") (footnote omitted).

Similarly, under the body of precedent that pre-dates the 1996 Act, the question whether the underlying transmission component of an integrated service offering must be stripped out and offered on a stand-alone basis depends upon the competitive state of the market. Although many communications

services include a transmission component, the general rule is that providers *need not* separate out the transmission component of a service offering and offer it on common carrier terms. Such a requirement has consistently been imposed only where a carrier or class of carriers enjoys "bottleneck" control over transmission facilities. FCC Pet. 90a n.163; *see id.* at 101a. The FCC has consistently, and rightly, declined to compel carriers to carve out and offer separately transmission services where they "d[id] not have market power" and thus would not be in a position to act anticompetitively. *Computer II*, 77 F.C.C.2d at 468-69. Even the Ninth Circuit, well before the decision in *Portland*, had confirmed the correctness of this approach. *See California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994); *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990).

The FCC correctly found in the *Declaratory Ruling* that the competitive nature of the broadband market eliminated any public interest reason to impose common carrier duties. The broadband Internet access market is vibrantly competitive and is only growing more so with each passing day. *See, e.g.*, *USTA II*, 359 F.3d at 585; *USTA I*, 290 F.3d at 428. Indeed, the Commission long ago confirmed that "no group of firms or technology will likely be able to dominate the provision of broadband services, " *Rulemaking to Amend Parts 1, 2, 21, and 25*, 15 F.C.C.R. 11,857, 11,865 (2000), and that "the preconditions for monopoly appear absent" in the separate broadband market, *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion*, 14 F.C.C.R. 2398, 2423-24 (1999). Thus, the Commission's decision not to separate out and impose common carrier treatment on the transmission component of cable modem service was amply supported by, and, indeed,

compelled by, the competitive state of the broadband market.[12] These same market characteristics fully justified, and, indeed, required, the FCC's decision not to perform what the Commission accurately termed "radical surgery" by requiring broadband providers to offer separately the transmission component of integrated Internet access services on common carrier terms. FCC Pet. 101a. The Ninth Circuit, on the other hand, completely ignored the competitive state of the broadband market. Its ruling thus stands in direct conflict with a substantial body of Commission and judicial precedent.

In sum, the panel decision in *Portland*, and by extension *Brand X*, fundamentally misapplied the Communications Act's statutory definitions and disregarded decades of precedent and the competitive realities of the broadband market. Absent this Court's review, the Ninth Circuit's decision will prevent the FCC from taking immediate and direct steps to "remove barriers to infrastructure investment" in order to encourage widespread broadband deployment, despite Congress' command that it do

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12. The FCC's decision in this regard was also consistent with a long line of precedent refusing to impose common carrier duties on pure transmission functions in competitive markets. *See, e.g., Licensing Under Title III of the Communications Act of 1934, as amended*, 8 F.C.C.R. 1387, 1388-91 (1993) (declining to impose common carrier duties on satellite services including mobile voice, data, and facsimile because carrier did not have "sufficient market power"); *Cox Cable Communications, Inc.*, 102 F.C.C.2d 110, 121-22 (1985) (declining to impose common carrier duties on high-speed digital transmission services on a carrier that "ha[d] little or no market power" and where "[t]here [we]re alternative methods of providing similar service"); *accord Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 207, 208 (D.C. Cir. 1982) (upholding Title I classification of enhanced services and customer premises equipment ("CPE") because "the market for enhanced services is 'truly competitive'" and "charges for CPE provided by carriers need no longer be regulated . . . because of the competitive market conditions now prevailing").

just that, 1996 Act, §§ 706(a), (b), and will relegate the Commission's reform efforts to the more cumbersome, indirect process of attempting to create a uniform national broadband policy by creating exceptions to generally applicable rules.

CONCLUSION

For the forgoing reasons, the Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

WILLIAM P. BARR
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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 22, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-35609

AT&T CORPORATION; TCI Cablevision of Oregon, Incorporated; TCI of Southern Washington,

Plaintiffs-Appellants,

and

Tele-Communications, Inc.,

Plaintiff,

and

US West Interprise America, Inc.; Oregon Internet Service Provider Association; OGC Telecomm, Ltd., dba Integra Telecom,

Intervenors,

v.

CITY OF PORTLAND; Multnomah County,

Defendants-Appellees,

GTE Internetworking, Inc.,

Intervenor.

Argued and Submitted Nov. 1, 1999
Filed June 22, 2000

Appendix A

Before: LEAVY, FERNANDEZ, and THOMAS, *Circuit Judges.*

THOMAS, Circuit Judge:

This appeal presents the question of whether a local cable franchising authority may condition a transfer of a cable franchise upon the cable operator's grant of unrestricted access to its cable broadband transmission facilities for Internet service providers other than the operator's proprietary service. We conclude that the Communications Act prohibits a franchising authority from doing so and reverse the judgment of the district court.

I

Distilled to its essence, this is a struggle for control over access to cable broadband technology. In broadband data transmission, a single medium carries multiple communications at high transmission speeds. The allure of broadband technology is that it allows users to access the Internet at speeds fifty to several hundred times faster than those available through conventional computer modems connected to what is commonly referenced in the telecommunications industry as "plain old telephone service." Broadband allows transmission, or "streaming," of live video and audio communications, as well as video and audio data files. To satisfy consumer demand for broadband Internet access, cable television operators have replaced coaxial wires with fiber-optic cable, telephone companies have initiated high-frequency digital subscriber line ("DSL") services over standard twisted-pair copper wires, fixed wireless providers

have upgraded their microwave transmission capacities, satellite providers have launched global two-way digital networks, and researchers have explored the use of quantum communication methods.

The race to acquire broadband transmission systems has, in part, prompted a number of corporate mergers. This appeal concerns the merger between AT & T, at the time the nation's largest long distance telephone provider, and Telecommunications, Inc. ("TCI"), one of the nation's largest cable television operators. In addition to providing traditional cable television programming, TCI provided cable broadband Internet access to consumers in certain geographic areas. Since acquiring TCI, AT & T has continued to offer cable broadband access as part of its "@Home" service, which bundles its cable conduit with Excite, an Internet service provider ("ISP") under an exclusive contract. Like many other ISPs, @Home supplements its Internet access with user e-mail accounts and a Web portal site, a default home page gateway offering Internet search capabilities and proprietary content devoted to chat groups, interactive gaming, shopping, finance, news, and other topics. @Home subscribers also may "click-through" to other free Web portal sites, and may access other Internet service providers if they are willing to pay for an additional ISP; however, subscribers cannot purchase cable broadband access separately from an unaffiliated ISP, and have no choice over terms of Internet service such as content and bandwidth restrictions.

The @Home cable broadband infrastructure differs from that of most ISPs. A typical ISP connects with the Internet via leased telecommunications lines, which its consumers

access through "dial-up" connections over ordinary telephone lines. @Home operates a proprietary national "backbone," a high-speed network parallel to the networks carrying most Internet traffic, which connects to those other Internet conduits at multiple network access points. This backbone serves regional data hubs which manage the network and deliver Excite's online content and services, including multimedia content that exploits broadband transmission speeds. Each hub connects to local "headend" facilities, cable system transmission plants that receive and deliver programming, where "proxy" servers cache frequently requested Internet data, such as Web sites, for local delivery. Each headend connects to cable nodes in neighborhoods, each of which in turn connects via coaxial cable to the user's cable modem and computer.

To effect the merger, AT & T and TCI sought three types of regulatory approval. The Department of Justice approved the merger on antitrust grounds, subject to TCI's divestiture of its interest in Sprint PCS wireless services. *See United States v. AT & T Corp., Tele-Communications, Inc.*, No. CIV. 98 CV03170, 1999 WL 1211462 (D.D.C. Aug. 23, 1999) (final judgment). The Federal Communications Commission ("FCC") approved the transfer of federal licenses from TCI to AT & T, after addressing public interest concerns in four service areas, including residential Internet access. *See Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from TCI to AT & T*, 14 F.C.C.R. 3160, 1999 WL 76930 (1999) ("*Transfer Order*").

One of the issues that the FCC considered forms the undercurrent of the present controversy: whether to impose

a requirement of open access to cable broadband facilities. A variety of interest groups and competitors argued that allowing AT & T to restrict cable broadband access to the proprietary @Home service would harm competition and reduce consumer choice. In its order approving the license transfer, the FCC rejected any open access condition, citing the emergence of competing methods of high-speed Internet access, and @Home customers' "ability to access the Internet content or portal of his or her choice." It found "that the equal access issues raised by parties to this proceeding do not provide a basis for conditioning, denying, or designating for hearing any of the requested transfers of licenses and authorizations." *Transfer Order* at ¶ 96. The FCC concluded that "while the merger is unlikely to yield anti-competitive effects, we believe it may yield public interest benefits to consumers in the form of a quicker roll-out of high-speed Internet access services." *Transfer Order* at ¶ 94.

The last regulatory hurdle that AT & T and TCI faced was the approval of local franchising authorities where required by local franchising agreements. *See* 47 U.S.C. § 537 (permitting franchising authority approval of cable system sales when the franchise agreement so requires). TCI's franchises with Portland and Multnomah County (collectively, "Portland") permitted the city to "condition any Transfer upon such conditions, related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of the Franchise, as it deems appropriate." This language parallels the text of 47 U.S.C. § 541(a)(4)(C), which describes the conditions a locality may impose on a franchise.

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Portland referred the transfer application for recommendation by the Mount Hood Cable Regulatory Commission, an intergovernmental agency overseeing cable affairs in the Portland region. In response to Portland's preliminary questions, AT & T confirmed that TCI was in the process of upgrading its cable system to support @Home over cable broadband, and maintained that @Home was a proprietary product "not subject to common carrier obligations." At public hearings, the incumbent local telephone exchange carrier U.S. WEST and the Oregon Internet Service Providers Association called for open access to TCI's cable broadband network, citing-in addition to consumer welfare-the need for "a level playing field" with U.S. WEST's common carrier obligations and a "very real potential that consumer [Internet] access businesses could go out of business." The Mount Hood Commission recommended that the city and county approve the transfer of franchise control subject to an open access requirement.

On December 17, 1998, Portland and Multnomah County voted to approve the transfer, subject to an open access condition expressed in a written acceptance:

> *Non-discriminatory access to cable modem platform.* Transferee shall provide, and cause the Franchisees to provide, non-discriminatory access to the Franchisees' cable modem platform for providers of Internet and on-line services, whether or not such providers are affiliated with the Transferee or the Franchisees, unless otherwise required by applicable law. So long as cable modem services are deemed to be "cable

> services," as provided under Title VI of the Communications Act of 1934, as amended, Transferee and the Franchisees shall comply with all requirements regarding such services, including but not limited to, the inclusion of revenues from cable modem services and access within the gross revenues of the Franchisees' cable franchises, and commercial leased access requirements.

AT & T refused the condition, which resulted in a denial of the request to transfer the franchises. AT & T then brought this action, seeking declarations that the open access condition violated the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151, *et seq.* (collectively, the "Communications Act"), the franchise agreements, and the Constitution's Commerce Clause, Contract Clause, and First Amendment. The district court rejected all of AT & T's claims and granted summary judgment to Portland. *See AT & T Corp. v. City of Portland*, 43 F.Supp.2d 1146 (D.Or.1999). We review de novo a grant of summary judgment; there being no disputed factual issues, we face only a question of statutory interpretation. *See Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 432 (9th Cir.1994).

II

The parties, and numerous amici, forcefully urge us to consider what our national policy should be concerning open access to the Internet. However, that is not our task, and in

our quicksilver technological environment it doubtless would be an idle exercise. The history of the Internet is a chronicle of innovation by improvisation, from its genesis as a national defense research network, to a medium of academic exchange, to a hacker cyber-subculture, to the commercial engine for the so-called "New Economy." Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal landscape, and chart a course by the law's words. To that end, "we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy." *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir.1999) (citation omitted). We note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us. Thus, we are not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 1300-01, 146 L.Ed.2d 121 (2000).

A

Because Portland premised its open access condition on its position that @Home is a "cable service" governed by the franchise, we begin with the question of whether the @Home service truly is a "cable service" as Congress defined it in the Communications Act. We conclude that it is not.

Subject to limited exceptions, the Communications Act provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). The Act defines

"cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). For the purposes of this definition, "video programming" means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and "other programming service" means "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The essence of cable service, therefore, is one-way transmission of programming to subscribers generally.

This definition does not fit @Home. Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user views seemingly static content. Thus, the communication concepts are distinct in both a practical and a technical sense. Surfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another.

Further, applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results, inconsistent with the statutory structure. For example, cable operators like AT & T may be required by a franchising authority to set aside cable channels for public, educational or governmental use, *see* 47 U.S.C. § 531, must designate some of their channels for commercial use by persons unaffiliated with the operator, *see* 47 U.S.C. § 532, and must carry the signals of local commercial and non-commercial educational television stations, *see* 47 U.S.C. § § 534 & 535. We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet. As our sister circuit concluded in the context of the abortive "video dialtone" common carrier television technology, regulating @Home as a cable service "simply makes no sense in any respect, and would be infeasible in many respects." *National Cable Television Ass'n. v. FCC*, 33 F.3d 66, 75 (D.C.Cir.1994).

Thus, because the Internet services AT & T provides through @Home cable modem access are not "cable services" under the Communications Act, Portland may not directly regulate them through its franchising authority.

B

Although we conclude that a cable operator may provide cable broadband Internet access without a cable service franchise, we must also determine whether Portland may condition AT & T's provision of standard cable service upon its opening access to the cable broadband network for competing ISPs. To do so, we must determine how the Communications Act defines @Home.

Appendix A

Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a "point of presence" assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A provider of telecommunications services is a "telecommunications carrier," which the Act treats as a common carrier to the extent that it provides telecommunications to the public, "regardless of the facilities used." 47 U.S.C. § 153(44) & (46).

By contrast, the FCC considers the ISP as providing "information services" under the Act, defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20) (1996). As the definition suggests, ISPs are themselves users of telecommunications when they lease lines to transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the "public" in terms of the statutory definition of telecommunications service, they provide "information services," and therefore are not subject to regulation as telecommunications carriers. *See Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, ¶¶ BM, CB, 1998 WL 166178 (1998) (report to Congress); *cf.* Child Online Protection Act, Pub.L. No. 105-277,

§ 1403(e)(4), 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231(e)(4)) & Internet Tax Freedom Act, Pub.L. No. 105-277, § 1101(e), 112 Stat. 2681 (1998) (reproduced at note to 47 U.S.C. § 151(e) (1998)) (defining Internet access services as: "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services."). Indeed, "information services"—the codified term for what the FCC first called "enhanced services"—have never been subject to regulation under the Communications Act. *See Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir.2000); *see also* 47 C.F.R. § 64.702(a); *California v. FCC*, 905 F.2d 1217, 1223- 25 (9th Cir.1990) (discussing history of "enhanced services" non-regulation).

Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

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Under this taxonomy, the Communications Act bars Portland from conditioning the franchise transfer upon AT & T's provision of the @Home transmission element that constitutes telecommunications:

> (3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—
>
> > (i) such cable operator or affiliate shall not be required to obtain a franchise under this title for the provision of telecommunications services; and
> >
> > (ii) the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services.
>
> (B) A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.
>
> (C) A franchising authority may not order a cable operator or affiliate thereof—
>
> > (i) to discontinue the provision of a telecommunications service, or

> (ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.
>
> (D) Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

Pub.L. No. 104-104, § 303(a), 110 Stat. 56, 124-25 (1996), codified at 47 U.S.C. § 541(b)(3); *see also* § 101(a), 110 Stat. at 70, codified at 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."). Subsection 541(b)(3) expresses both an awareness that cable operators could provide telecommunications services, and an intention that those telecommunications services be regulated as such, rather than as cable services.

Appendix A

The Communications Act includes cable broadband transmission as one of the "telecommunications services" a cable operator may provide over its cable system. Thus, AT & T need not obtain a franchise to offer cable broadband, *see* 47 U.S.C. § 541(b)(3)(A); Portland may not impose any requirement that has "the purpose or effect of prohibiting, limiting, restricting or conditioning" AT & T's provision of cable broadband, *see* 47 U.S.C. § 541(b)(3)(B); Portland may not order AT & T to discontinue cable broadband, *see* 47 U.S.C. § 541(b)(3)(C); and Portland may not require AT & T to provide cable broadband as a condition of the franchise transfer, *see* 47 U.S.C. § 541(b)(3)(D). Therefore, under the several provisions of § 541(b)(3), Portland may not regulate AT & T's provision of @Home in its capacity as a franchising authority, and the open access condition contained in the franchise transfer agreement is void.

C

Beyond the domain of cable-specific regulation, the definition of cable broadband as a telecommunications service coheres with the overall structure of the Communications Act as amended by the Telecommunications Act of 1996, and the FCC's existing regulatory regime. Elsewhere, the Communications Act contemplates the provision of telecommunications services by cable operators over cable systems. *See, e.g.*, 47 U.S.C. § 224(d)(3) (authorizing FCC utility pole attachment rate-setting "for any pole attachment used by a cable system . . . to provide any telecommunications service."). In the Telecommunications Act, Congress defined advanced telecommunications capability "without regard to any transmission media or

technology," in terms that describe cable broadband: "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Pub.L. 104-104, § 706(c)(1), 110 Stat. 56, 153 (1996) (reproduced at note under 47 U.S.C. § 157). Consistent with our view, the FCC regulates DSL service, a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations. *See GTE Operating Companies Tariff No. 1*, 13 F.C.C.R. 22466, 1998 WL 758441 (1998).

Among its broad reforms, the Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection. *See* 47 U.S.C. § 201(a) ("It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor"); 47 U.S.C. § 251(a)(1) ("Each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"). Together, these provisions mandate a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers. As applied to the Internet, Portland calls it "open access," while AT & T dysphemizes it as "forced access." Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." 47 U.S.C. § 153(46). The Internet's protocols themselves manifest a related principle called "end-

to-end": control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.

Thus far, the FCC has not subjected cable broadband to any regulation, including common carrier telecommunications regulation. We note that the FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. *See* 47 U.S.C. § 160(a). Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters.

III

We hold that subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act. Therefore, Portland may not condition the transfer of the cable franchise on non-discriminatory access to AT & T's cable broadband network. We need not reach AT & T's other statutory and constitutional arguments.

REVERSED.

APPENDIX B — TELECOMMUNICATIONS ACT OF 1996, § 706, PUB. L. NO. 104-104 (1996), 110 STAT. 153, *REPRINTED IN* 47 U.S.C. § 157 NOTE

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HISTORICAL AND STATUTORY NOTES

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Advanced Telecommunications Incentives

Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended *Pub.L. 107-110, § 1076*(gg), Jan. 8, 2002, 115 Stat. 2093, provided that:

> "**(a) In general.**—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

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"**(b) Inquiry.**—The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

"**(c) Definitions.**—For purposes of this subsection:

> "**(1) Advanced telecommunications capability.**—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

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"**(2) Elementary and secondary schools.**—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [*20 U.S.C.A. § 7801*]."

[Except as otherwise provided, amendments by *Pub.L. 107-110* effective Jan. 8, 2002, see *Pub.L. 107-110, § 5*, set out as a note under *20 U.S.C.A. § 6301*.]